SUPREME COURT OF ARIZONA

In re the Matter of: JOHN JOSEPH TERRELL, Petitioner/Appellee, v. RUBY TORRES, Respondent/Appellant.	Arizona Supreme Court No. CV-19-0106-PR Court of Appeals Division One No. 1 CA-CV 17-0617 FC Maricopa County Superior Court No. FN2016-001785

PETITIONER/APPELLEE'S SUPPLEMENTAL BRIEF

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I. Properly construed, the parties' agreement requires the Court to order donation.

No one disputes that under the contractual approach, cryopreservation agreements concerning disposing of preembryos are valid, binding, and enforceable, and that courts interpret such agreements under ordinary contract law, using the usual construction principles. *See* Pet. at 12–14; Opp. at 9–10; Op. ¶ 38.

Here, the text, structure, and purpose of the agreement confirm that neither partner may use the preembryos unless the other *contemporaneously* consents. If the partners cannot agree, then their only option is to donate the embryos to another couple trying to conceive. The court of appeals violated the parties' agreement and ignored settled contract law when it awarded the preembryos to Ruby without John's contemporaneous permission.

A. The text of the agreement forecloses all options except donation.

"The primary and ultimate purpose of [contract] interpretation is to discover th[e parties'] intent and to make it effective." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152 (1993) (quoting 3 Corbin on Contracts § 572B, at 421 (1992 Supp.)). To ascertain the parties' intent, courts "look to the plain meaning of the words as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259 (App. 1983); *see also Cardon v. Cotton*

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* APP refers to the appendix attached to the petition for review.

Lane Holdings, Inc., 173 Ariz. 203, 207 (1992) (requiring court to construe "a contract in its entirety and in such a way that every part is given effect"). "It is a cardinal rule of contract interpretation that [courts] do not construe one term of a contract to essentially render meaningless another term." *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 478, ¶ 56 (App. 2010). "As a corollary, each part of a contract must be read together, to bring harmony, if possible, between all parts of the writing." *Gesina v. Gen. Elec. Co.*, 162 Ariz. 39, 45 (App. 1988) (citation and internal quotation marks omitted).

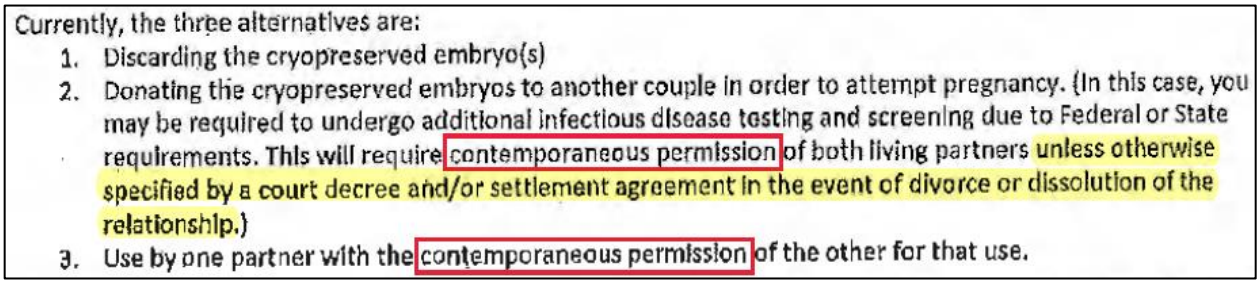
There are three possible options for what to do with the preembryos upon divorce: (1) destroy them, (2) donate them to another couple trying to conceive, or (3) allow one partner to use them. Neither side wants option 1 (destruction), and, as explained below, the parties rejected that option anyway. Consequently, the central question is whether the parties' agreement permits option 2 (donation) or option 3 (unilateral use) when the parties cannot agree on what to do. Construed harmoniously and in context, the plain terms of the cryopreservation agreement *prohibit* unilateral use, but *allow* a court to order donation. Thus, by the process of elimination, the only available option for the courts when the parties disagree is donation; any other disposition would violate the terms of the agreement.

At the outset, §§ 8–9 specify that the preembryos "shall be the *joint property of both*" John and Ruby, and that "[a]s owners of any and all such embryo(s), *the*

consent of both will be required concerning their use or disposition." APP065 (emphases added). The next section (§ 10) elaborates on the disposition options. It lists "discarding" (i.e., destruction) as the first option (§ 10.1), followed by donation (§ 10.2), and unilateral use (§ 10.3). APP065. Section 10(3) specifies that use by one partner requires "contemporaneous permission of the other"—no exceptions. *Id.* In other words, without *both parties'* contemporaneous permission, § 10(3) does not allow unilateral use.

By contrast, § 10(2) states that donation requires "contemporaneous permission of both living partners, *unless otherwise specified by a court decree and/or settlement agreement in the event of divorce or dissolution of the relationship.*" *Id.* (emphasis added). In other words, even without both parties' contemporaneous permission, a court has the power to order donation.

As shown below, the "unless otherwise specified" exception for donation in § 10(2) is not present in § 10(3), confirming that without contemporaneous permission, a court has the power to order donation but not unilateral use.

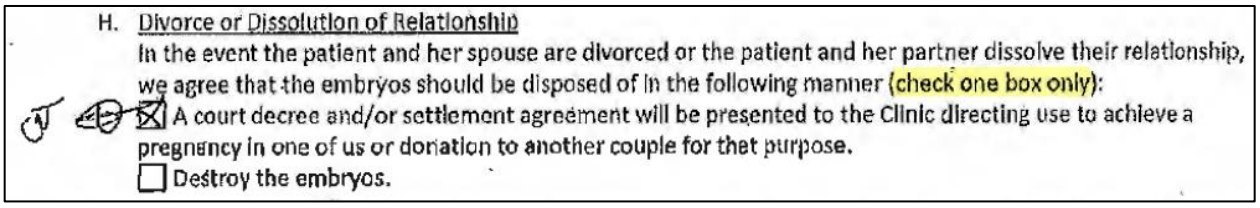


Currently, the three alternatives are:

1. Discarding the cryopreserved embryo(s)
2. Donating the cryopreserved embryos to another couple in order to attempt pregnancy. (In this case, you may be required to undergo additional infectious disease testing and screening due to Federal or State requirements. This will require contemporaneous permission of both living partners unless otherwise specified by a court decree and/or settlement agreement in the event of divorce or dissolution of the relationship.)
3. Use by one partner with the contemporaneous permission of the other for that use.

The remainder of the agreement likewise prohibits unilateral donation without consent. In §§ 10(A) through 10(H), the Clinic's agreement instructs the parties to select one of the authorized disposition options in the event of death (§§ 10(E)–(G)), nonpayment of storage fees (§ 10(B)), and divorce (§ 10(H)), among others.

Subsection H ("Divorce or Dissolution of Relationship") offers a couple two choices, encompassing all three disposition possibilities (use, donation, and destruction). The agreement instructed them to select *one box only*. As they did throughout the contract, John and Ruby decided against letting the Clinic destroy the preembryos (box 2). Instead, the couple agreed that if they divorced, they would provide the Clinic with a court decree or settlement agreement authorizing donation or unilateral use (box 1). APP068.



H. Divorce or Dissolution of Relationship

In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only):

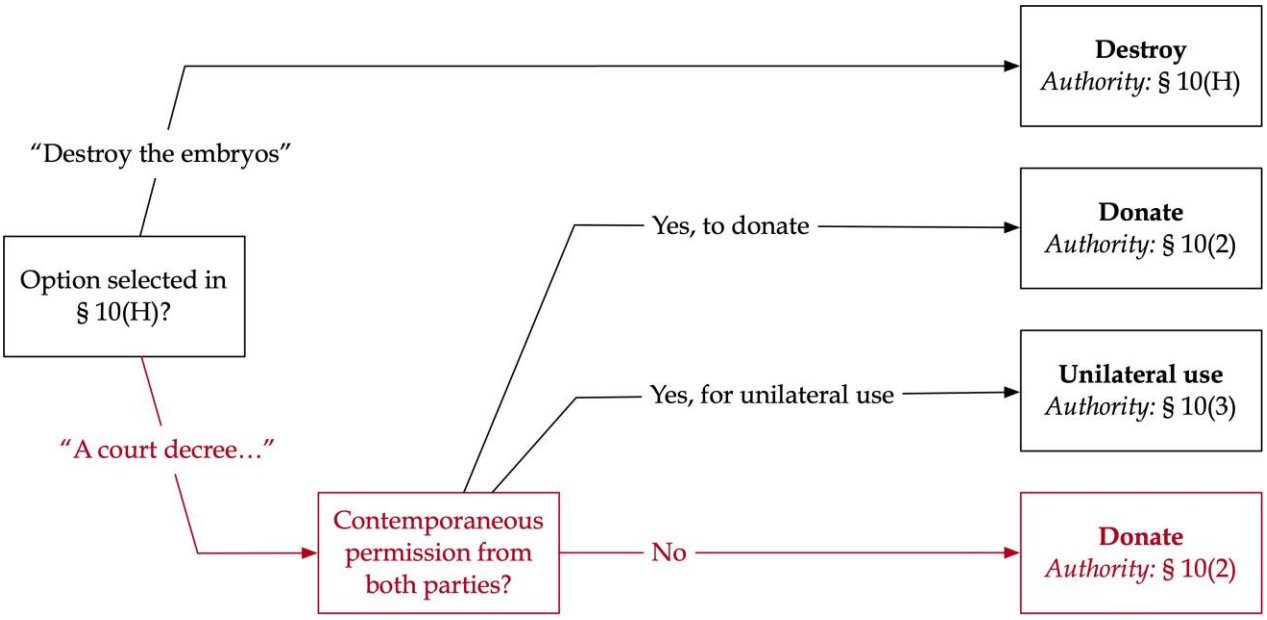
☒ A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.

☐ Destroy the embryos.

Importantly, § 10(H) does not ask the parties to elect between unilateral use or donation. Consequently, the couple's selection under § 10(H) does not tell the court *which* of these options—unilateral use or donation—to order. Nor does it state that the court can substitute its own judgment in place of the parties' contractual choices. Rather, § 10(H) simply obligates the divorcing couple to

provide the Clinic with a legal directive before the Clinic will allow *anyone* to use the preembryos. Thus, § 10(H) requires a court to examine the rest of the couple's agreement to determine which disposition option it may order under the circumstances presented at the time of their divorce. Reading all of § 10's terms together, the court's only option is donation when the parties do not consent to either of them using the preembryos.

In sum, the parties took destruction off the table in § 10(H). In § 10(3), the parties agreed that unilateral use would require "contemporaneous permission" of both parties. And in § 10(2), the parties agreed that the preembryos could be donated either with "contemporaneous permission" *or* by "court decree" upon divorce. Because the parties have not given contemporaneous permission, the agreement does not permit unilateral use. By the process of elimination, donation is the only remaining option that the parties agreed a court could order without contemporaneous permission. Ruby—a sophisticated attorney—admitted as much. APP130. The diagram below illustrates the options:



Only the red path remains viable in light of the parties' contractual choices and their current disagreement. All other options have been foreclosed.

B. The agreement's structure and purpose confirm this interpretation of the agreement.

In addition to the text, the agreement's structure and purpose confirm that both parties must contemporaneously consent before either one uses the preembryos. Accordingly, the only permissible option is donation.

First, § 10(H) did even not *offer* the parties an option that expressly authorizes unilateral use without contemporaneous permission. The agreement offered that option in only *two* circumstances. One circumstance is obvious—if either party dies, then contemporaneous permission is literally impossible, so the agreement does not require it (§§ 10(E)–(F)). APP067–68. The other circumstance occurs if the parties "mutually agree to discontinue IVF treatment" (§ 10(A)), but

of course that reflects a mutual decision. APP066. The agreement invited the parties to *explicitly* choose to allow unilateral use only in those limited circumstances, and ticking those boxes would eliminate the contemporaneous-mutual-permission requirement in § 10(3). *None* of the subsections addressing other life circumstances offer that option. And unlike several other sections (§§ 10(A), (E), (F), & (G)), the choices for § 10(H) do not include a fill-in-the-blank option allowing the parties to specify a custom disposition. In short, the Clinic did not offer the parties the choice of overriding the contemporaneous-mutual-permission requirement in § 10(H), so the agreement should not be interpreted to override that requirement.

The Agreement's repeated references to consent further underscore its importance. In addition to §§ 10(2)–(3), the "Note" in § 10 reiterates the need for both partners' consent. APP065 ("Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the *express, written consent* of *both* parties" (emphases added)). So, too, do §§ 8–9. *Id.* (stating that the preembryos "shall be the *joint property of both*" partners, and thus "*the consent of both* will be required concerning their use or disposition." (emphases added)).

In addition to its structure, the agreement's purpose reinforces that § 10(H) provides legal cover to the Clinic and not carte blanche authority for a court to

override the rest of the parties' contract. *Cf. Kass v. Kass*, 696 N.E.2d 174, 181–82 (N.Y. 1998) (criticizing lower court for construing term regarding disposition upon divorce "in isolation"; viewed "in the context of the consents as a whole," "th[is] isolated sentence was not dispositional at all but rather was clearly designed to insulate the hospital and the IVF program from liability in the event of a legal dispute over the pre-zygotes arising in the context of a divorce" (internal citation marks omitted)). Section 10(H) in particular is designed to minimize the Clinic's exposure in the event of future disputes. As Judge Cruz noted in her dissent, § 10(H) is the *only* disposition provision addressing a situation where the partners would be adverse to one another. Dissent ¶ 67. The Clinic's potential exposure is at its highest when a couple's relationship breaks down. Section 10(H) must be read in context—the Clinic drafted it to protect its *own* interests in the legally- and emotionally-fraught context of a couple's breakup.

Similarly, the Clinic cautioned the parties that although they were bound by the contract terms and their disposition choices, APP068 ("I/We understand that this decision is binding"), the Clinic could not guarantee that disposition would be carried out as specified in the agreement. APP065 (§ 10, ¶ 1) ("Since this is a rapidly evolving field, both medically and legally, the clinic cannot guarantee what

the available or acceptable avenues for disposition will be at any future date.").[1] In a small minority of states, courts have declined to enforce such agreements as a matter of public policy.[2] *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057–58 (Mass. 2000) (refusing to enforce agreement that would compel one donor to become a parent involuntarily because, as a matter of public policy, "forced procreation is not an area amenable to judicial enforcement"). Therefore, the Clinic's agreement cautiously notes that "[d]isposition may also be controlled by the final decision of a court or other governmental authority having jurisdiction." APP065 (§ 10, ¶ 3.)

Read in context, this cautionary statement is intended to insulate the Clinic from liability. *United Cal. Bank*, 140 Ariz. at 259 (a court must "look to the plain meaning of the words as viewed in the context of the contract as a whole"). It does not purport to provide a fourth disposition option (leave it to judicial discretion) that overrides every other provision in § 10. Construing it otherwise, as the court of

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[1] *See also* APP065 (§ 10, ¶ 8) ("IVF and embryo freezing are new areas in which legal principles and requirements have not been firmly established. . . . I/We understand that laws maybe established by the State or guidelines may change at any time."); APP068 (§ 11) ("The law regarding embryo cryopreservation, subsequent thaw and use, and parent-child status of any resulting child(ren) is, or may be, unsettled in the state in which either the patient, spouse, partner, or any donor currently or in the future lives . . . ."); *id.* ("We acknowledge that the ART Program has not given us legal advice, that we are not relying on the ART Program to give us any legal advice, and that we have been informed that we may wish to consult a lawyer . . . .").

[2] The parties agree that the Court should follow the majority of jurisdictions and enforce their agreement under the "contractual approach." Pet. at 11; Response at 8.

appeals did, Op. ¶ 39 n.8, improperly renders the rest of the contract's disposition terms meaningless (including the couple's choices in §§ 10(A)–(H)). *See, e.g.*, *Aztar Corp.*, 223 Ariz. at 478, ¶ 56 ("It is a cardinal rule of contract interpretation that [courts] do not construe one term of a contract to essentially render meaningless another term.").

In short, the text, structure, and purpose of the agreement confirm that John and Ruby agreed to a court-ordered donation of the preembryos upon divorce, unless they contemporaneously consented to unilateral use.

C. The court of appeals violated fundamental interpretive principles.

The court of appeals adopted a construction that ignores both the plain contract terms (which require both partners' contemporaneous permission for unilateral use) and the purpose of the agreement (to provide legal cover for the Clinic). The appellate court failed to consider "the plain meaning of the words as viewed in the context of the contract as a whole," *United Cal. Bank.*, 140 Ariz. at 259, and failed to give effect to all of the contract's terms. *Aztar*, 223 Ariz. at 478, ¶ 56. Fundamentally, the court of appeals improperly interpreted the agreement in a way that enabled the court to substitute its own judgment.

First, the court of appeals reasoned that John and Ruby's "affirmative response" in subsection (H) is more specific than the consent requirements elsewhere in § 10, and thus can be read as eliminating (or providing) the needed

consent. Op. ¶ 39. Not so. John and Ruby affirmatively responded to *all* terms in § 10 (and not just those requiring them to tick a box) by signing their initials to each page. APP064–69. And more importantly, neither of the two options offered in § 10(H) discusses consent. APP068. Consequently, selecting one or the other does not indicate that the parties were thereby agreeing to dispose of the consent requirement. The court of appeals's interpretation would have required John and Ruby to create their own option under § 10(H) to preserve the consent requirement, when the agreement did not provide any space for doing so (in contrast to other sections of the agreement, *see* APP066–68 & Argument § I.B).

Second, the court of appeals incorrectly found that John and Ruby gave their "express, written consent" by selecting one of the two options in § 10(H). Op. ¶ 39 ("the parties provided the necessary 'express, written consent' in subsection H"). But ticking one of § 10(H)'s boxes cannot provide the necessary consent requirement because §§ 10(2)–(3) require *contemporaneous* permission for use or donation.

Moreover, the parties *did* mutually agree to donation. Indeed, Ruby explicitly testified that she and John had agreed in the contract to donate the preembryos:

> I'm asking the court to order that the pre-embryos be award to me with use *or in the alternative to be donated just like the contract*. I want—you know, we both made this agreement when we were okay. And I understand things didn't go the way we planned—or at least the

> way I planned, I'm not sure. *But we did sign a contract and we agreed to these provisions. We agreed to donate them*.

APP130 (emphases added). Although John and Ruby disagree on the construction of various terms, they agree that their contract states that (1) both partners' permission is required before either may use the preembryos, and (2) if they divorce, a court may order the preembryos donated to a third party. Awarding the preembryos to Ruby over John's objection, when they both agreed to donation, is an absurd result.

Finally, the court of appeals misapplied the "specific modifies general" rule of contract interpretation when it found that § 10(H) "overcome[s] the more general 'Note.'" Op. ¶ 39. Although § 10(H) specifically addresses divorce, it does not tell the Court which disposition to order. In § 10(H), John and Ruby (a) took destruction off the table, and (b) agreed to present a court decree or settlement agreement to the Clinic authorizing either unilateral use or donation. Thus, although § 10(H) is in some ways specific, it does not purport to enable a court to select a disposition option that another part of the contract prohibits (i.e., unilateral use without permission).

II. If the balancing approach applies, the appellate court must remand rather than balancing the parties' interests itself.[3]

A. Arizona law required remand.

The dispute in this case arises from the family court's equitable division of marital assets under A.R.S. § 25-318. IR-60 at 3. An appellate court "will not disturb a [trial] court's division of property" in a marital-dissolution proceeding "absent *a clear abuse of discretion*." *In re Marriage of Cotter*, 245 Ariz. 82, 87, ¶ 14 (App. 2018) (emphasis added) (citation omitted).

"A court abuses its discretion when it commits an error of law in making a discretionary decision, reaches a conclusion without considering evidence, commits some other substantial error, or makes a finding lacking substantial evidentiary support." *Chandler v. Ellington*, No. 1 CA–CV 13–0648 FC, 2015 WL 3819094, at *2, ¶ 9 (Ariz. App. June 18, 2015) (mem.). Abuse of discretion review "does not include re-weighing conflicting evidence," however. *In re Marriage of Hurd*, 223 Ariz. 48, 52, ¶ 16 (App. 2009). Instead, appellate courts defer to the trial court's findings "[b]ecause the trial court is in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004) (citation and internal quotation marks omitted).

[3] If the Court resolves this dispute based on the text of the contract under issue 1, then issue 2 is moot and the Court need not reach it.

Consequently, if an appellate court determines that the trial court abused its discretion in weighing the evidence or applied improper factors when distributing marital property under A.R.S. § 25-318, remanding to the trial court is the appropriate remedy. *See In re Marriage of Bjotvedt*, No. 1 CA–CV 18–0500 FC, 2019 WL 2395115, at *5, ¶ 25 (Ariz. App. June 6, 2019) (mem.) (remanding for trial court to reconsider division of property based on proper factors); *see also In re Marriage of Kern*, No. 1 CA-CV17-0119 FC, 2018 WL 1633286, at *8, ¶ 32 (Ariz. App. Apr. 5, 2018) (mem.) (remanding for reconsideration of child support award); *Reeck v. Mendoza*, 232 Ariz. 299, 303, ¶ 14 (App. 2013) ("we cannot reweigh the evidence on appeal"); *Owen v. Blackhawk*, 206 Ariz. 418, 423, ¶ 24 (App. 2003) (ordering remand after finding trial court failed to give adequate consideration to key factor).

The court of appeals should have done the same here. The family court is in the best position to evaluate the credibility of the parties and witnesses, weigh the evidence, and make factual findings because the court questioned the witnesses and examined the evidence first-hand. Unfortunately, the panel elected to reweigh the evidence itself. *See, e.g.*, Op. ¶ 47 ("the court gave insufficient weight to Torres' desire . . ."); *id.* ¶ 48 ("the trial court erred when it placed heavy weight on the parties' inability to 'co-parent'"); *id.* ¶ 49 (criticizing trial court's weighing of Ruby's choice to freeze preembryos rather than eggs). As a result, the majority's

opinion contains many findings unsupported by the record. *See* Argument § II.C, below.

B. Other cryopreservation cases confirm that the court of appeals should have remanded.

Even setting aside the specific procedural context, the substantive law in the area of cryopreservation agreements likewise supports remand. Many courts applying the balancing approach have ordered remand upon finding that the lower court considered inappropriate factors or failed to properly apply appropriate ones. *See In re Marriage of Rooks*, 429 P.3d 579, 595, ¶ 73 (Colo. 2018) (finding lower courts considered inappropriate factors and remanding to trial court for re-balancing of parties' interests applying correct factors); *In re Marriage of Fabos*, --- P.3d ---, 2019 WL 2219696, at *10, ¶ 57 (Colo. App. May 23, 2019) (remanding for the district court to rebalance the parties' interests where trial court abused its discretion by weighing ex-wife's interest in donating preembryos more heavily than ex-husband's interest in avoiding procreation); *see also In re Marriage of Litowitz*, 48 P.3d 261, 271, 274, *as amended*, 53 P.3d 316 (Wash. 2002) (Chambers, J., concurring in part and dissenting in part) (concluding that case should have been remanded for the trial court to evaluate the parties' intent under proper standard; "[e]ven if we were to disagree with the trial court, it was the trial court's discretion to exercise, not ours").

These cases confirm that the court of appeals erred when it reweighed the parties' interest itself, instead of remanding for the trial court to do so in the first instance.

C. The court of appeals considered improper factors under the balancing approach.

The panel never should have reached the balancing approach. But having done so, it compounded its error by weighing inappropriate factors to reach its preferred result when balancing donation to another couple versus Ruby's unilateral use.

Consider child support, for example. The Clinic's contract provides that preembryo donation will be handled confidentially and any "offspring will attain the legal status of adopted children without legal ties to the biological parents." APP068 (§ 12). In other words, if the preembryos are donated, another couple will raise the children as their own and fully assume the accompanying financial obligation. By contrast, if Ruby uses the preembryos, John is potentially liable for child support.[4] *See* A.R.S. §§ 25-501(A), 25-814(A).

The court of appeals improperly dismissed John's concerns about his potential child support obligations. While acknowledging that John could "of course" be legally responsible for child support if Ruby used the preembryos, the

[4] Ruby testified that, as a lawyer, she understood she could not waive child support and the State could come after John if she were to use the preembryos to have a child. Trial Tr. at 91:11–93:18 (filed in Court of Appeals on Nov. 15, 2017).

court of appeals still did not weigh this factor in John's favor because "[t]hat reality is the same today as it was when the parties executed the IVF Agreement nearly four years ago." Op. ¶ 52. But that fact does not make the child support implications of donation versus unilateral use by Ruby any less relevant to the balance of interests.

Unilateral use also presents significant emotional entanglements compared to anonymous donation to another couple. John has serious concerns about having children with his ex-wife, including that Ruby may try to drive a wedge between him and his child by "painting me into some monster." APP108. Moreover, John and Ruby live in the same community and have overlapping social circles, making it highly likely that John's family and friends would know the children born to Ruby, thus "forcing him to choose between accepting parenthood or crassly and openly avoiding it." Dissent ¶ 80. By contrast, if the preembryos were donated, it would be done confidentially and any children born to the donee couple would be raised by them as their own. APP068. Yet the court of appeals entirely disregarded the emotional and practical consequences of unilateral use by John's ex-wife compared to anonymous donation to another couple. *See* Op. ¶¶ 44–56.

In addition, the majority used the circumstances of John's donation against him in the balance of interests based on its finding that John effectively prevented

Ruby from having a viable preembryo ready for implantation. Op. ¶ 49. This conclusion is both factually incorrect and legally improper, however.

First, no evidence suggests that John coerced Ruby into using him as the sole donor. To the contrary, Ruby testified that she could have gone with another donor, APP132, but chose to fertilize all her eggs with John's sperm under an agreement that stated neither of them could use the preembryos without the other's consent. APP133. Further, Ruby had the option of using multiple sperm donors to fertilize her 13 eggs—for example, both the former partner who agreed to donate *and* John. APP177; IR-38 (Fertility Clinic Agreement) at 8 (allowing partners to specify more than one donor, or an alternate donor in case the first-choice donor's sperm aren't viable). The majority's conclusion that Ruby "would likely have viable cryogenically preserved embryos ready for implantation" absent John's "intervention" is pure speculation. *See* Op. ¶ 49.

Second, punishing John for this perceived wrongdoing by weighing it against him when balancing the parties' interests violates Arizona law. *See* Op. ¶¶ 46, 49, 56. This Court's precedent specifically prohibits a court from distributing marital assets in a way to punish one of the parties. *Hatch v. Hatch*, 113 Ariz. 130, 133 (1976) ("Property may not be distributed in order to reward one party or punish the other."). But the court of appeals did just that when it weighed the circumstances of John's donation against him and in favor of Ruby. *See, e.g.*,

Op. ¶ 56 ("The majority finds Torres' interest in the embryos—*especially given that she gave up the opportunity to use another donor* . . .—outweighs Terrell's interest in avoiding procreation." (emphasis added)).

The majority opinion contains many similar errors. *Compare, e.g.*, Op. ¶¶ 53–54 (concluding trial court erred by considering parties' constitutional rights to procreate and to not procreate), *with Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992) (explaining that the balancing approach "centers on the two aspects of procreational autonomy—the right to procreate and the right to avoid procreation"). Thus, if this Court concludes that the balancing approach applies here, it should remand for the trial court to reweigh the parties' interests using the appropriate factors.

CONCLUSION

The Court should vacate and remand with instructions to order donation of the preembryos.

RESPECTFULLY SUBMITTED this 17th day of September, 2019.

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